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IN THE
UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 63-186-Civ-J-S

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
a Maryland corporation,

Plaintiff,

v.

USAFORM HAIL POOL, INC.,
a Florida corporation.
U. S. & FOREIGN MANAGEMENT, LTD.,
a New York corporation.
U. S. & FOREIGN MANAGEMENT, INC.,
a Florida corporation;
BARBARA B. MURPHY,
as receiver for each of said corporations,

Defendants.

(Stamped: "Filed Jan. 14, 1974 — Jacksonville, Fla.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action arose out of the financial collapse of a small corporate empire, controlled by F. Wylly Clarke (Clarke), consisting of five corporations, engaged in related businesses of reinsurance brokers, managers of hail insurance pools, and a general insurance agency, in which, with one exception, Clarke owned all of the stock, and in the exception, he owned 50% of the stock.

Background

On August 30, 1963, Fidelity and Deposit Company of Maryland (F & D) brought this action for declaratory judgment against Usaform Hail Pool, Inc. (Hail Pool), U. S. & Foreign Management, Ltd. (Limited), U. S. & Foreign Management, Inc. (Management, Inc.), and Barbara B. Murphy, as receiver for the three corporate defendants, seeking a judicial determination of the rights and obligations of the parties to a blanket position bond (Clt's Ex. 1, App. pp. 239a-245a), (bond), wherein F & D was named as Underwriter, and Limited, Management, Inc., Hail Pool, Usaform Pan American, Ltd. (Pan American), and Halifax Insurance Agency, Inc. (Halifax), and two other Clarke corporations (not important here), were named as Insured.

After the action was brought, various insurance companies who were shareholders in the hail insurance pool, managed by Hail Pool (pool participants), and who had employed Limited and Pan American as insurance brokers (underwriters group), who were not named as insureds in the bond, made claims on the bond for the loss of their premium moneys allegedly held by Hail Pool, Limited, and Pan American, and sought to intervene in the action as parties defendant in order to assert their claims directly against F & D.

To avoid a multiplicity of suits, and upon a stipulation of the parties, an order was entered on October 3, 1964, which allowed Empire Insurance Company to intervene as the class representative for the pool participants, and Stuyvesant Insurance Company to intervene as the class representative for the underwriters group. The intervenors were ordered to plead to the complaint for declaratory judgment.

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All defendants and intervening defendants filed an amended answer, and counterclaims consisting of twelve separate counts.

On motion by F & D, the court, on November 14, 1966, entered summary judgment dismissing Counterclaim Counts I, III, IV, V, VII, IX, X, XI, and XII, on the ground that there was no genuine issue as to any material fact, and that F & D was entitled to judgment as a matter of law on each of those counterclaim counts.

The court held that neither the pool participants nor the underwriters group had any right of action against F & D on the bond.

On appeal to the Court of Appeals for the Fifth Circuit, that court affirmed the judgment of the district court, and remanded the case for trial on the issues presented by Counterclaim Counts II, VI and VIII. *American Empire Insurance Company of South Dakota, et al.* v. *Fidelity and Deposit Company of Maryland,* 408 F.2d 72 (5th Cir. 1969), certiorari denied, 396 U.S. 818, 24 L.Ed. 2d 69. The intervening defendants representing the pool participants and underwriters group, except Pan American, are no longer before the Court.

On August 3, 1970, this case went to trial before the Court, without a jury, on the issues presented by Counterclaim Counts II, VI, and VIII. The issues presented by those counts were whether Hail Pool, Limited, and Pan American could recover on the bond, which insured the fidelity of their employees, the amounts which the Insured owed to the pool participants and underwriters group for premium moneys which the Insured had used to pay their operating expenses and other corporate obligations.

The trial proceeded on the legal theory that the bond covered the premium moneys belonging to the pool participants and underwriters group, and that, when the employees of Hail Pool, Limited and Pan American used those premium moneys, alleged to be "trust funds", to pay operating expenses and other corporate obligations of the Insured, they fraudulently embezzled or diverted those premium moneys belonging to the pool participants and underwriters group. Judgment was entered against F & D and in favor of the Insureds for the debts they owed to the pool participants and underwriters group. *Fidelity and Deposit Company of Maryland* v. *Usaform Hail Pool, Inc., et al.*, 318 F. Supp. 1301 (1970).

F & D appealed from that judgment to the Court of Appeals for the Fifth Circuit, and that court vacated the judgment, and remanded the case to this Court for further consideration and the entry of additional findings on the question whether the moneys taken from the insured companies' premium accounts went to pay legitimate expenses of the respective companies. *Fidelity and Deposit Company of Maryland* v. *Usaform Hail Pool, Inc., et al.*, 463 F. 2d 4 (5th Cir. 1972).

This cause came on for hearing on January 26, 1973, on the written list of claims presented by claimants which they contend represent losses for which they are entitled to recover in light of the legal principles established by the opinion of the Court of Appeals, and on F & D's written response to each of those claims.

The Court having heard the parties, and considered the evidence before the Court in light of the legal principles announced in the opinion of the Court of Appeals, finds the facts and states the conclusions of law, as follows:

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Findings of Facts

I

CLAIMS ASSERTED BY HAIL POOL

A. Payment Of Debenture To Clarke In Amount Of $10,000.00. The receiver for Hail Pool claims that the payment of $10,000 to Clarke to redeem a $10,000 debenture is a transfer of funds to him as stockholder, but the evidence in the record shows the fact to be otherwise.

1. Hail Pool was organized on November 18, 1961, with $100,000 capital, consisting of 400 shares of common stock, at $250 per share, all of which were issued to Clarke, and Clarke paid into the corporation $100,000 in cash, which he borrowed from Marine Midland Trust Company of New York, and pledged the stock as security.

2. At the same time, Hail Pool issued debentures, having an aggregate face value of $100,000, which the board of directors authorized to be sold on a discount basis; all of which were purchased by Clarke, and he paid into the corporation a total of $94,200 cash, which he also borrowed from Marine Midland Trust Company and Mercantile National Bank of Miami Beach, and pledged the debentures as security. Thus, the corporation received in its corporate bank account the full purchase price of both the stock and the debentures.

3. On July 10, 1962, Hail Pool drew its check to Clarke for $10,000, in payment of a $10,000 debenture which had become due. On the same date, Clarke drew his own check to the order of Marine Midland Trust Company for $10,000 to apply on the $100,000 loan, and to redeem the debenture, which he returned to the corporation, and the corporation carried it in its balance sheet as an asset.

4. The evidence fails to show that premium moneys were in fact used to redeem the debenture. The debenture was a legitimate obligation of the corporation, and the money was used to pay a legitimate obligation. Clarke was only a conduit through which the payment was made to Marine Midland Trust Company. Hail Pool could not recover on the bond for the $10,000 payment if it were solvent, and had adequate funds to pay all of its debts. The claimants have failed to meet the burden of proof required to prove that this item represents a loss covered by the bond.

B. Two Payments To Clarke Amounting to $2,450.00. The receiver for Hail Pool claims that two checks drawn to the order of Clarke for $1,200 and $1,250, respectively were moneys diverted to the personal use of Stockholder Clarke, and, therefore, represent a recoverable loss.

1. The mere assertion that the payments to Clarke are fraudulent diversions of funds, without more does not make out an insured loss. The parties have stipulated that the two checks were charged on Hail Pool's books to travel and entertainment expense. The parties are bound by that stipulation.

2. Clarke testified positively, and without contradiction, that the two checks were for travel and entertainment expense. He testified that he did a great deal of traveling in quest of business, and that testimony was corroborated by Grundy and Stebler.

3. Travel and entertainment expense, incurred in quest of business, is a legitimate corporate business expense. There is no evidence that Hail Pool did not get the benefit of the two payments. Hail Pool has sustained no loss as a result of these two payments to Clarke, much less a dishonesty loss.

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C. Loan to Halifax In The Amount of $14,000.00 The receiver of Hail Pool claims that the loan to Halifax was a fraudulent diversion of corporate funds to the personal use of Stockholder Clarke, which caused Hail Pool a loss covered by the bond.

1. The mere conclusory statement that the loan was a dishonest and fraudulent diversion of corporate funds, without more, does not suffice to make out an insured loss. Dishonesty and fraud are not presumed, but must be proved by evidence that is clear, cogent, and convincing.

2. The undisputed evidence in the record shows that, on June 11, 1962, Hail Pool drew a check on its general operating account to the order of Halifax for $14,000, and entered the payment in its records as an account receivable from Halifax, and described it as an advance.

3. Clarke was a 50% stockholder of Halifax, and a 100% stockholder of Hail Pool. Halifax had been an affiliated corporation in the Clarke corporate empire since about 1958, and it had been a joint insured in the bond since it became effective on June 30, 1959. It conducted a general insurance agency in Daytona Beach, Florida, and there is evidence in the record that it did produce some business for the other Clarke corporations.

4. Clarke testified positively, and without contradiction, that the purpose of the loan was "to keep Halifax afloat." It was necessary to keep Halifax afloat. Clarke discussed the situation with several of the directors before it was made, and they all thought it was a wise investment at the time. Clarke further testified, without contradiction, that he never received any advances, salary, or expenses from Halifax over the years.

5. Clarke was trying to sell Hail Pool as a going concern about that time for enough money to pay off the cred-

itors of all of the corporations. His testimony that it was necessary to keep Halifax afloat strongly indicates that he was also trying to sell Halifax, for he testified that the value of the agency as a going concern was two and a half times the annual commissions earned on the renewal of the business on the books. If Halifax failed, it would have no value. Similarly, if one member of the corporate complex failed, it would cause the other members to fail, and that, too, would ruin any chance of selling Hail Pool.

6. There is no claim, and no evidence to show, that Hail Pool was prohibited by either its by-laws or its charter from making the loan or advance to Halifax. There is no evidence in the record to show that the loan was not made in good faith, and in the regular course of business. The evidence shows that Hail Pool's stockholders, directors, and officers believed at the time that the loan was in the best interests of Hail Pool.

7. The situation here is very similar to the situation in *Kerr* v. *Aetna Casualty & Surety Co.*, 350 F.2d 146, 150 (4th Cir. 1965). In that case there were numerous transactions between several of the insured named in the bond, including loans, contributions to capital, advances and commissions. The court held that there was no loss with respect to those items. The court further held that positive acts of wrongdoing against the insured corporations must be shown for there to be a recovery on the fidelity bond (350 F.2d at p. 151).

8. Certainly the loan to Halifax is not a dishonest and fraudulent diversion of funds per se. The receiver has not met the burden of proof necessary to establish the loan as a dishonesty loss for which there can be a recovery on the bond. On the evidence in the record, Hail Pool could not recover this item as an insured loss, if it were solvent, and

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had sufficient assets to pay its debts, and the receiver, whose rights are no better, cannot recover.

D. Hail Pool's Advances of $63,331.10 To Limited. The receiver for Hail Pool claims that Hail Pool's advances to Limited are fraudulent diversions of corporate funds to other corporations without legal claims, and, therefore, they constitute an insured loss.

1. Limited's balance sheet at December 31, 1962 showed advances payable to Hail Pool in the amount of $63,331.10, and that appears to be the basis of the receiver's claim for $63,331.10. The ground upon which the receiver claims that those net advances to Limited are fraudulent diversions of Hail Pool funds is that Limited is a corporation solely owned by Clarke. The fact is that Hail Pool, too, is solely owned by Clarke. That fact alone does not make the advances fraudulent.

2. The clear and undisputed evidence shows that there were reciprocal advances between Hail Pool and Limited in 1962. The practice of reciprocal advances between the affiliated corporations as a form of mutual assistance which was of long standing, and it was not wrong per se. These reciprocal advances are clearly debit and credit transactions between the insured. Everything appears on its face to be open, and above board. The certified public accountants who audited the books were unanimous in their testimony on that point. That is the very opposite to dishonest and fraudulent diversions. Concealment is the badge of fraud. Any person who perpetrates a fraud on another does not make an open record of that fact.

3. There is no evidence that any employee of Hail Pool, including Clarke, received any personal benefit from the advances. The transactions were not dishonest or fraudulent per se. If both Hail Pool and Limited were solvent and

able to pay their debts in full, the advances would be considered legitimate business transactions between the insured, and Hail Pool could not recover the balance from F & D as a dishonesty loss. The burden is on the receiver to prove positive acts of wrongdoing against the insured corporations and a resulting loss before there can be a recovery, and that burden has not been met here. It is important to keep in mind that the bond insured only the several insured against losses due to acts of dishonesty against the insured, and not the insured's creditors.

E. Payment Of 1961 Pool Debts In Amount of $170,467.18. The receiver for Hail Pool Claims that the payment of the 1961 Hail Pool debts out of the 1962 premium moneys is a dishonest diversion of Hail Pool funds to other corporations without legal claim to the funds, and that it is an insured loss.

1. The receiver has adduced no factual evidence to support this claim. There is no factual basis for the claim. On the contrary, the evidence shows clearly that there is no basis for the claim in fact or law under the legal principles which govern this case.

2. By formal contract ratified and approved by Hail Pool's board of directors on November 30, 1961, Hail Pool assumed all liabilities and obligations of Management, Inc., including the 1961 hail pool debts. The 1961 hail pool debts were valid contract obligations of Hail Pool to the same extent as the debt for office rent would be. "(T)he taking of money from the premium account of an insured company to pay other legitimate obligations of that company does not constitute a loss within the meaning of the fidelity bond before us in this case" (463 F.2d at p. 7).

3. There is no evidence to support a charge that any employee of Hail Pool committed a dishonest or fraudulent

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act in paying the 1961 pool debts. There is no evidence to prove that Hail Pool sustained a loss through such payments. If Hail Pool were a going concern, and financially able to pay its debts, it could not recover on the bond on account of such payments.

4. Positive acts of wrongdoing against Hail Pool must be shown with respect to each of the claimed losses before there can be a recovery on the bond. The Court finds that no such acts have been shown and that all of the claimed losses to Hail Pool were not caused by any fraud or dishonesty of its employees covered by the bond.

II

Claims Asserted By Limited

A. Limited's Advances To Pan American $237,361.44. The receiver for Limited claims that the advances to Pan American were fraudulent diversions of Limited's funds to Pan American, which make out an insured loss.

1. The receiver asserts a claim for the entire amount shown on Limited's Balance Sheet as of December 31, 1962, which was prepared by Stebler. Greenfield, a certified public accountant, employed by the underwriters group, listed payments by Limited to Pan American over a three year period, aggregating an amount in excess of the amount claimed, which would indicate that there were reciprocal debits and credits between Limited and Pan American, with the net account receivable being shown on the balance sheet, which Limited carried as an asset.

2. In 1959, Limited purchased all of the stock of Pan American's predecessor in name. Thus, Pan American became a wholly owned subsidiary of Limited to engage in the same reinsurance brokerage business as Limited, but

Pan American would operate in South America. Pan American and Limited occupied the same offices; they shared the overhead and operating expenses; they had identical boards of directors; and their two top officers were the same. Pan American has been a joint insured in the bond since its acquisition by Limited. Saul Greenfield, a certified public accountant employed by the underwriters group, considered that Limited and Pan American had identical interests, and that they were one and the same corporations for all practical purposes. He prepared a combined balance sheet for both corporations as of February 28, 1963.

3. The receiver's evidence adduced at the trial of the case, for the purpose of proving the allegations in Limited's Counterclaim Count VI that "Clarke, acting alone and/or in collusion with other employees of Limited, did fraudulently and/or dishonestly embezzle, steal, (or) divert *** reinsurance premiums *** belonging to the underwriters group," shows only that, in 1960, 1961, and 1962, Limited drew checks on its premium account in Marine Midland Trust Company to the order of Pan American, and nothing more. That evidence is totally insufficient to support the present claim that Limited's employees embezzled, stole, or diverted Limited's moneys from Limited which caused Limited a loss within the meaning of the bond.

4. The evidence shows, without dispute, that the advances to Pan American went to pay the overhead and operating expenses chargeable to Pan American for bookkeeping purposes. The payments must be considered in the same light as if Limited had paid all of the overhead and operating expenses of both corporations by check, and charged Pan American with its pro rata share of those expenses by means of debit and credit memorandums. The better bookkeeping practice is to use checks instead of internal debit and credit memorandums. In either event, the books of

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Limited would show accounts receivable from Pan American, and Pan American's books would show accounts payable to Limited, and that is exactly what the books of both corporations did show.

5. There is no evidence that any employees personally benefitted from the advances. There is no evidence to show that the advances were motivated by fraud or dishonesty on the part of Limited's employees. Fraud and dishonesty are never presumed. The burden is on him who charges fraud and dishonesty to prove them by evidence that is clear and convincing.

6. The claim here that Limited's advances to Pan American caused Limited a loss due to the fraud and dishonesty of Limited's employees is identical with the claim of the trustee for National Discount in *Kerr* v. *Aetna Casualty & Surety Co.*, 350 F. 2d 146, 150, 151 (4th Cir. 1965). There, National Discount made advances and loans to Title, its wholly owned subsidiary to enable the latter to stay alive, and operate. The trustee there made the same argument which is made here, but the court held that the claimed losses to National Discount were not due to any fraud or dishonesty covered by the bond. The court held "that positive acts of wrongdoing against the insured corporation must be shown" in order to establish an insured loss.

7. The Court finds that Limited's advances to Pan American were not fraudulent or dishonest diversions of its funds by its employees which caused it a loss covered by the bond. The Court further finds that, if Limited were now solvent, and had sufficient assets to pay its debts in full, it could not recover those advances as losses under the bond, and the receiver, whose rights are no better than Limited's cannot recover.

B. Account Receivable Due From Stockholder $33,163.52. The receiver for Limited now claims that the account receivable from Clarke shown on Limited's Balance Sheet as of December 31, 1962, is a fraudulent diversion of Limited's funds to the personal use of Clarke, which caused Limited a loss due to Clarke's fraud and dishonesty covered by the bond.

1. The balance sheet was prepared by Stebler, Limited's vice president and treasurer, and it lists as an asset, "Due from stockholder $33,163.52." On its face, the account receivable is a debit and credit transaction between Clarke and Limited. There is no coverage under the bond for debit and credit transactions.

2. The bond covers only losses caused by the fraudulent or dishonest acts of the Insured's employees. Clarke testified by deposition, without contradiction, that he owed Management, Inc. and Limited approximately $150,000 on account of loans obtained from them over a period of time from about 1954 to the end of 1961, and that the $150,000 figure represented the cumulative amount of the several loans. Clarke testified that the purpose of the loans was to pay income taxes. Stebler testified that the account receivable on Limited's books represented advances to Clarke over a period of time. Clarke also testified, without contradiction, that his salary for all three operating corporations was set at $37,500 per year, but he had never drawn the full salary, and in 1962, he testified that he and his wife together were paid only $30,000 as salary. Clarke further testified that, in 1962, he had incurred traveling expenses in behalf of the three corporations which amounted to between $25,000 and $30,000, which he personally paid out of his own pocket, and for which he had not been reimbursed.

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3. Barbara Murphy, testifying in her own behalf, stated that she actually handled Clarke's personal bank account; that she deposited his checks in the bank account; that she drew checks on that account in payment of his household bills; that she reconciled his bank statements with the cancelled checks; and that, in handling Clarke's personal affairs, she saw no evidence that Clarke had committed any acts of impropriety against the corporations. She testified that Clarke "was going all over the country trying to sell the hail pool business; and he even applied to the Small Business Administration for loans to try to pay off all creditors." She testified in addition that Clarke took no money from the corporations improperly, and that he was not dipping into the tills. The conduct described by Clarke and by Murphy, which stands uncontradicted, does not equate with fraud or dishonesty.

4. No one has ever claimed, or even suggested, that the advances were not entirely legitimate transactions when made. Each advance was clearly recorded on Limited's records by someone other than Clarke, and they appeared on the books for all to see. The advances were not fraudulent per se. Fraud and dishonesty are never presumed. He who charges fraud or dishonesty must prove the charge by evidence that is clear and convincing. Positive acts of wrongdoing against Limited must be shown in order to make out an insured loss. The Court finds that there is no evidence to support this claimed loss to Limited which is due to any fraud or dishonesty covered by the bond. The Court further finds that, if Limited were now solvent, and had assets with which to pay its debts in full, it could not recover such advances under the bond, and the receiver, whose rights are no better than Limited's cannot recover.

C. Loan Receivable $10,145.90. The receiver for Limited claims that a loan receivable shown on Limited's Balance

Sheet as of December 31, 1962 in the amount of $10,145.90 is a fraudulent diversion of Limited's funds to the personal use of its employees which caused it a loss covered by the bond.

1. The only evidence of this loan receivable is Limited's Balance Sheet as of December 31, 1962, which was prepared by Stebler, Limited's vice president and treasurer. Although the receiver for Limited examined Stebler by deposition on the balance sheet at the trial, Stebler was not questioned about this loan receivable. The only evidence about it is that it appears on the balance sheet. There is no evidence to show when or how the loan originated, to whom it was made, or that it was made to an employee of Limited. In any event, it was carried on Limited's book as an asset, which is the opposite of a loss.

2. There is no evidence to show any factual basis for the bald, conclusory assertion that the loan receivable is a fraudulent diversion of Limited's funds to the personal use of an employee. There is no evidence to show that Limited was involuntarily deprived of the proceeds of the loan. On the record, it appears to be a legitimate and bona fide transaction.

3. The Court finds no evidence to show any positive acts of wrongdoing against Limited with respect to this claim, and that the claimed loss to Limited does not result from any act of fraud or dishonesty covered by the bond. If Limited were solvent, and had assets sufficient to pay its debts in full, it could not recover this item of claim under the bond, and the receiver, whose rights are no better than Limited's cannot recover.

D. Limited's Advances To International $1,333.84. The receiver for Limited now claims that a check drawn by Limited on the premium account in Marine Midland Trust

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Company to the order of Usaform International, Ltd. for $1,333.84 is a fraudulent diversion of Limited's funds to International which caused Limited an insured loss.

1. The check appeared on a list of checks prepared by Saul Greenfield at the receiver's request to show Limtied's transfers of funds from the premium account to Limited's operating account, or to pay other obligations of Limited, on the theory that such transfers constituted embezzlement or theft by Limited of "trust funds" which made out an insured loss. That theory has been rejected by the Court of Appeals, and the check, standing alone, provides no evidence that it was a fraudulent or dishonest diversion of funds which caused Limited a loss within the meaning of the bond.

2. There is no evidence in the record to show that the check was not in payment of a perfectly legitimate account owed by Limited to International. Fraud and dishonesty cannot be presumed. The burden is on him who charges fraud and dishonesty to prove the charge by evidence that is clear and convincing. The Court finds that positive acts of wrongdoing against Limited have not been shown, and that this claimed loss to Limited does not result from any act of fraud or dishonesty which is covered by the bond. If Limited were solvent, and had assets with which to pay its debts in full, it would not be able to recover this item of claim as a loss under the bond, and the receiver whose rights are no better than Limited's cannot recover.

III

Claims Asserted by Pan American

A. Pan American's Advances To International $11,600.00. Pan American claims that eleven checks which were drawn on its premium account in Marine Midland

Trust Company, payable to International are fraudulent diversions of its funds to International, which caused it a loss covered by the bond.

1. The evidence in the record shows only that International was a European corporation formed for the purpose of handling the European and world wide reinsurance brokerage business for Limited and Pan American; that the corporation was organized by a trust company in Switzerland, which put up the money for the stock, and the trust company held the stock for the benefit of Limited; that the relationship between Limited and Pan American on the one hand, and International on the other hand, was that Limited and Pan American managed International; and that there were transfers from the premium account to International to cover the overhead of its office in Zurich, Switzerland.

2. The evidence further shows that the transfers complained of here are included in Limited's advances to Pan American to enable Pan American to pay International's operating expenses. Thus, Pan American was no more than a mere conduit through which Limited paid International's overhead and operating expenses. The evidence is clear that Pan American could have no loss on account of the advances to International, much less a fraud or dishonesty loss.

3. The Court fiinds no evidence to support this claimed loss to Pan American which was caused by any act of fraud or dishonesty covered by the bond.

B. Pan American's Advances To Clarke and Stebler $11,600.00. Claim is now made on behalf of Pan American that twenty-one checks drawn by Pan American on its premium account in Marine Midland Trust Company to the order of Clarke and Stebler during the year, 1962, amount-

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ing in the aggregate to $11,600 are fraudulent diversions of Pan American's funds to the personal use of Clarke and Stebler, which caused Pan American an insured loss.

1. There is no evidence in the record to support this claim. Fraudulent and dishonest diversions of funds cannot be presumed from the sole fact that the payments were made out of the premium account in Marine Midland Trust Company. There is no evidence whatever to show the purpose of the payments. The payments are not charged on Pan American's records to Clarke and Stebler personally. In light of the meticulous entries of all advances kept by the three corporations, the absence of any charges of the payments to Clarke and Stebler strongly indicates that the payments were for legitimate purposes. The uncontroverted testimony of Stebler is that he received nothing from either Limited or Pan American, except his salary.

2. The uncontradicted evidence further shows that the payments now complained of are included in Limited's advances to Pan American to enable Pan American to pay its share of the overhead and operating expenses. Pan American was no more than a conduit through which Limited made the payments for the overhead and operating expenses. Those payments are wash transactions, and the Court of Appeals has held that such transactions do not make out insured losses. *Fidelity and Deposit Company* v. *Usaform Hail Pool, Inc.*, 463 F. 2d 4, at p. 6; *Kerr* v. *Aetna Casualty & Surety Co.*, 350 F. 2d 146, 150 (4th Cir. 1965).

3. The Court finds that there is no evidence to support this claim that the payments to Clarke and Stebler caused a loss to Pan American due to any acts of fraud or dishonesty covered by the bond. The Court further finds that, if Pan American were now solvent, and had sufficient assets to pay its debts in full, it could not recover those payments

as a loss under the bond. Its insolvency does not improve its situation against the bonding company.

Conclusions of Law

Since jurisdiction is based on diversity of citizenship, 28 U.S.C.A., § 1332, the case is controlled by Florida law.

The bond in this case was written to indemnify the insureds against loss which the insureds shall sustain through any fraudulent or dishonest act of their employees, not losses sustained by the insureds' creditors. *Fidelity and Deposit Company of Maryland* v. *Usaform Hail Pool, Inc., et al*, 463 F. 2d 4, 5 (5th Cir. 1972); *Kerr* v. *Aetna Casualty & Surety Co.*, 350 F. 2d 146, 150 (4th Cir. 1965).

Fraud and dishonesty are never presumed and the burden of proving fraud and dishonesty is on the party who asserts it. *Biscayne Boulevard Properties, Inc.* v. *Graham, Fla.*, 65 So. 2d 858. Proof of fraud and dishonesty must be clear and convincing. *Middleton* v. *Plantation Homes, Inc., Fla.*, 71 So. 2d 503; *Biscayne Boulevard Properties, Inc.* v. *Graham, supra; Graessle* v. *Shultz*, 90 So. 2d 37, 38 (Fla. 1956).

In this case, the receiver for Hail Pool and Limited, and Pan American are the parties who have asserted that the claimed losses to each of them are caused by acts of fraud and dishonesty on the part of their employees in fraudulently diverting their funds to the personal use of employees, amounting to embezzlement or theft, or diverting their funds to others, which also amount to embezzlement or theft from the insured corporations. The burden is on Hail Pool, Limited, and Pan American to prove the acts of fraud or dishonesty by affirmative proof that is clear and convincing. The burden is not on F & D to prove that the claimed losses to each of the insured corporations was not caused by acts of fraud and dishonesty covered by the bond.

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In order to show personal "fraudulent or dishonest acts" within the meaning of the bond, there must exist a compelling sense of conscious wrong rather than mere omission or act amounting to negligence. *Sade* v. *National Surety Corp.*, 203 F.Supp. 680, 684 (D.D.C. 1962), affirmed, 314 F.2d 286 (D.C. Cir. 1963).

In order to recover on the bond before us in this case, positive acts of wrongdoing against the insured corporations must be shown. *Kerr* v. *Aetna Casualty & Surety Co.*, 350 F.2d 146, 151 (4th Cir. 1965).

"The case must be viewed as if the insured companies were solvent and had adequate funds in their general accounts to replace the money diverted from the premium accounts. If the insureds cannot recover on the bond in that situation, their insolvency does not improve their case against the bonding company." *Fidelity and Deposit Company of Maryland* v. *Usaform Hail Pool, Inc., et al.*, 463 F.2d 4, 5 (5th Cir. 1972); *Scott* v. *Armstrong*, 146 U.S. 499, 507, 13 S. Ct. 148 (1892); *Fidelity & Casualty Co. of New York* v. *Hoyle*, 64 F.2d 413, 415 (4th Cir. 1933).

In order to recover on the bond in this case, it is necessary to prove first of all that the employees committed fraudulent and dishonest acts which caused the insureds a loss. Fraud and dishonesty are questions of fact which must be proved by evidence that is clear and convincing. They are not matters of law.

When the claims now asserted in behalf of Hail Pool, Limited, and Pan American are considered in light of the evidence in the record and the controlling principles of law, it is clear that the claimants cannot prove any affirmative acts of wrongdoing against the insured corporations. They cannot meet the standards which have been established to govern disposition of the case.

It is equally clear that bald, conclusory assertions of fraud and dishonesty, without more, will not establish fraud or dishonesty. The claimants have not pointed out any evidence in the record which will provide clear and convincing proof of the fraudulent or dishonest acts which they have asserted.

At the hearing on this case, the claimants cited several cases which they claimed supported their assertion of fraudulent and dishonest acts connected with each of the transactions now claimed to have resulted in a loss which is covered by the bond.

The first case relied on by the claimants is *Maule Industries* v. *Gerstel*, 232 F.2d 294 (5th Cir. 1956), which arose out of a bankruptcy proceeding, and it involved a petition by a creditor for a turnover order, requiring a corporation and its receiver to turn over the property of the corporation to the trustee of another bankrupt corporation. The petition alleged that the second corporation was controlled and directed by the first (bankrupt); that the second corporation had substantially the same officers, directors and stockholders, and that the second corporation was an instrumentality of the bankrupt corporation. The turnover order was denied, and the court said, (232 F.2d at 297):

> "The burden in this case is upon Maule (the petitioning creditor) to establish by pleadings and proof that Ludwig Bros., Inc. is 'an artifice and a sham designed to execute illegitimate purposes in abuse of the corporate fiction and the immunity that it carries'."

That case is not in point with the situation involved here, but on the question of fraud and dishonesty, the court reaffirmed the rule that the burden is on the party asserting fraud or dishonesty in any form to prove the charge by evidence that is clear and convincing.

BLEED THROUGH

Wooddale v. *Fidelity and Deposit Co.*, 378 F. 2d 627 (8th Cir. 1967), was an action on a fidelity bond, and the only question involved there was whether the culprit was an employee of the insured, or not. There, the piercing of the corporate veil doctrine was mentioned only indirectly. The court simply held that, in order to pierce the corporate veil, one must allege and prove that the corporation was organized for purposes of fraud. The only purpose in trying to pierce the corporate veil is to allow a creditor to go behind the corporation, and recover from the sole stockholder the amount of the corporate debt to the same extent as if the debt had been incurred by the stockholder as an individual. That has nothing to do with this case, for this is an action to recover on a fidelity bond for losses caused by the alleged fraudulent and dishonest acts of employees of the insured corporations.

Corsicana National Bank v. *Johnson*, 251 U.S. 68, 40 S. Ct. 82 (1919), was an action by a bank against its former director and vice president on a statutory cause of action which makes the directors liable to the bank for making illegal or excessive loans. That case is of no help whatever to the claimants in this case. This is not an action against the directors of the insured corporations, but an action to recover on a fidelity bond protecting the insured corporations against the acts of their employees.

Geddes, et al. v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 41 S. Ct. 209 (1921), was an action by minority stockholders of a corporation to set aside a sale of the corporate assets to another corporation. The two corporations had a common director on both boards. That case has no application whatever to the situation involved here, for no stockholder has attacked any transactions complained of. Neither corporation has attacked any of the transactions

involved. That case is distinguishable from this case both on its facts and its law.

Finally, *Pepper* v. *Litton,* 308 U.S. 295, 60 S.Ct. 238, 84 L. Ed. 281 (1939), arose out of a bankruptcy proceeding, and involved the question whether the bankruptcy court could disallow either as a secured or as a general or unsecured claim a judgment obtained by the dominant and controlling stockholder of the bankrupt corporation on alleged salary claims. It involved a scheme in fraud of creditors, and the bankrupt trustee sought to set it aside. Again, that case has absolutely no applicability to anything involved in this action.

Here, no creditor has sought to set aside any transaction. No creditor has sought to pierce the corporate veil, and recover the alleged losses from Clarke as the sole stockholder. No creditor has attacked the validity of any transactions involved between the corporations.

This is an action on a fidelity bond to recover losses alleged to have been sustained through fraudulent or dishonest acts of the insureds' employees. The receiver for Hail Pool and Limited, and Pan American have not met the burden of proof required to show that their claimed losses are caused by acts of fraud and dishonesty covered by the bond.

On the evidence, considered in light of the legal principles which govern this case, the Court concludes that Barbara B. Murphy, as receiver for Usaform Hail Pool, Inc., Barbara B. Murphy, as receiver for U. S. & Foreign Management, Ltd., and Usaform Pan American, Ltd., are not entitled to recover anything against Fidelity and Deposit Company of Maryland under the bond. Accordingly, Counterclaim Counts II, VI and VIII are dismissed with prejudice.

BLEED THROUGH

Judgement will enter in favor of Fidelity and Deposit Company of Maryland dismissing the counterclaim counts.

DONE AND ORDERED at Jacksonville, Florida, this 14th day of January, 1974.

s/ CHARLES R. SCOTT
Judge

Copies to:

GEORGE STELLJES, JR., ESQUIRE
Post Office Box 447
Jacksonville, Florida, 32201

ELMER W. BEASLEY, ESQUIRE
880 Asylum Avenue
Hartford, Connecticut, 06105

THOMAS T. COBB, ESQUIRE
444 North Beach Street
Post Office Box 191
Daytona Beach, Florida, 32015

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 63-186-Civ-J-S

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation,

Plaintiff,

v.

USAFORM HAIL POOL, INC., a Florida corporation; U.S. & FOREIGN MANAGEMENT, LTD., a New York corporation; U.S. & FOREIGN MANAGEMENT, INC., a Florida corporation; BARBARA B. MURPHY, as receiver for each of said corporations,

Defendants.

Stamped: "F I L E D Jan. 14, 1974 — Jacksonville, Fla."

FINAL JUDGMENT

This cause came on for final hearing before the Court and findings of fact and conclusions of law having been filed herein, it is, therefore,

ORDERED AND ADJUDGED:

That Barbara B. Murphy, as receiver for Usaform Hail Pool, Inc., Barbara B. Murphy, as receiver for U.S. & Foreign Management, Ltd., and Usaform Pan American, Ltd., do have and recover nothing; that Counts II, VI and VII of the counterclaim be dismissed on their merits, with prejudice; and that plaintiff Fidelity and Deposit Company of

BLEED THROUGH

Maryland do have and recover of and from defendants its costs to be hereinafter taxed by the Clerk.

DONE AND ORDERED at Jacksonville, Florida, this 14th day of January, 1974.

s/ CHARLES R. SCOTT,
Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 63-186-Civ-J-S

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, a Maryland corporation,
Plaintiff,

v.

USAFORM HAIL POOL, INC., a Florida corporation; U.S. & FOREIGN MANAGEMENT, LTD., a New York corporation; U.S. & FOREIGN MANAGEMENT, INC., a Florida corporation; BARBARA B. MURPHY, as receiver for each of said corporations,
Defendants.

Stamped: "F I L E D Jacksonville, Fla., Jan. 28, 1974
Wesley R. Thies, Clerk"

MOTION TO DISMISS APPEAL

Defendants move this Court to dismiss the appeal filed in this cause on November 19, 1973 under Rule 42(a) of the Federal Rules of Appellate Procedure for the reason that the judgment upon which said appeal was based has been vacated by this Court by Order dated January 14, 1974.

BLEED THROUGH

Defendants respectfully request that this Order be entered under Federal Rules of Appellate Procedure 27(b) without hearing and without awaiting a response hereto.

COBB, COLE, SIGERSON, MCCOY,
BELL & BOND

By s/ W. WARREN COLE, JR.
Post Office Box 191
Daytona Beach,
Florida 32015
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Motion has been served by mail to GEORGE STELLJES, JR., Esquire, Post Office Box 441, Jacksonville, Florida 32201 and ELMER W. BEASLEY, Esquire 880 Asylum Avenue, Hartford, Connecticut 06105, this 27th day of January, A.L. 1974.

s/ S. WARREN COLE, JR.
Attorney

BLEED THROUGH

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 63-186-Civ-J-S

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
a Maryland corporation,

Plaintiff,

vs.

USAFORM HAIL POOL, INC., a Florida corporation; U.S. & FOREIGN MANAGEMENT, LTD., a New York corporation; U.S. & FOREIGN MANAGEMENT, INC., a Florida corporation; BARBARA B. MURPHY, as receiver for each of said corporations.

Defendants.

Stamped: "F I L E D Jacksonville, Fla., Jan. 28, 1974
Wesley R. Thies, Clerk"

ORDER

The Motion of Defendants to dismiss the pending appeal in this cause having been duly considered, it is hereby

ORDERED AND ADJUDGED:

1. That the appeal in this cause filed on November 19, 1973 is hereby dismissed, it appearing to the Court that said appeal has not been docketed in the Court of Appeals, and that the judgment upon which said appeal was based has been vacated by this Court.

2. That this Order is entered pursuant to Federal Rules of Appellate Procedure 27(b).

DONE AND ORDERED at Jacksonville, Florida, this 28th day of January, 1974.

s/ CHARLES R. SCOTT
Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Order has been served by mail to W. WARREN COLE, JR., Esquire, Post Office Box 191, Daytona Beach, Florida 32015, GEORGE STELLJES, JR., Esquire, Post Office Box 447, Jacksonville, Florida 32201 and ELMER W. BEASLEY, Esquire, 880 Asylum Avenue, Hartford, Connecticut 06105, this 29th day of January, A.D. 1974.

WESLEY R. THIES, CLERK

By s/ FRANK HENDERSON, JR.
Deputy Clerk

BLEED THROUGH

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 63-186-Civ-J-S

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation,

Plaintiff,

vs.

USAFORM HAIL POOL, INC., a Florida corporation; U.S. & FOREIGN MANAGEMENT, LTD., a New York corporation; U.S. & FOREIGN MANAGEMENT, INC., a Florida corporation; BARBARA B. MURPHY, as receiver for each of said corporations,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Defendants, USAFORM HAIL POOL, INC., a Florida corporation; U.S. & FOREIGN MANAGEMENT, LTD., a New York corporation; U.S. & FOREIGN MANAGEMENT, INC., a Florida corporation; BARBARA B. MURPHY, as receiver for each of said corporations, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Final Judgment, and the Findings of Fact and Conclusions of

Law in support thereof, entered in this action on the 14th day of January, A.D. 1974.

COBB, COLE, SIGERSON, MCCOY, BELL & BOND

By s/ W. WARREN COLE, JR.
Post Office Box 191
Daytona Beach,
Florida 32015
Attorneys for Defendants

BLEED THROUGH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by mail to GEORGE STELLJES, JR., Esquire, Post Office Box 447, Jacksonville, Florida 32201 and ELMER W. BEASLEY, Esquire, 880 Asylum Avenue, Hartford, Connecticut 06105, this 1st day of February, A.D. 1974.

s/ W. WARREN COLE, JR.
Attorney

BLEED THROUGH